IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES W. JORDAN, *Appellant.* *vs.* UNITED STATES OF AMERICA, *Appellee.*	No. 5916

Appellant's Brief

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APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an action on a policy of War risk insurance.

The appellant, James W. Jordan, enlisted in the military service of the United States on the 5th day of February 1918. No defects or disabilities of plaintiff were noted by any officer of the United States at the date of, or prior to, his application, acceptance and enrollment in the Service or prior to his application for war risk insurance. (Tr. 11-12)*

*(As this appeal is being prosecuted in forma pauperis, the transcript of record has not been printed. There may be some slight error in page references.)

Appellant, on March 11, 1918, and on June 1, 1918, made application for policies of war risk insurance in the sum of $5,000.00 each, and certificates of insurance were issued to the appellant effective the date of the respective applications. Premiums were paid by appellant on said policies from the date of their issuance up to and including the premium due September 1, 1918. (Tr. 12)

Appellant was honorably discharged from the Service September 4, 1918, because of disability resulting from epilepsy. (Tr. 12)

The case was tried with a jury and a special verdict returned as follows:

SPECIAL INTERROGATORY: Was the plaintiff, James W. Jordan, permanently and totally disabled from epilepsy between the date of his entry into the service of the United States, February 5, 1918, and the date of his first insurance contract for $5,000.00. To which the jury answered "YES" (Tr. 15-16)

The appellant moved for judgment upon the special verdict (Tr. 17-18). This motion was by the Court denied and judgment was rendered for appellee (Tr. 18).

The appellant requested the court to charge the jury, in effect, that the policies issued had been in force for a period of more than six months and that because of the incontestable provision, Section 307 of the World War Veterans' Act of 1924, 43 Stat. 627, the validity of the policies could not now be questioned by

the appellee. (Tr. 12-13) These requested instructions were refused by the court.

The principal issue in this case is the construction of the incontestable provision contained in Section 307 of the World War Veterans' Act of 1924 and its applicability to the facts set forth above.

SPECIFICATIONS OF ERROR

I.

That the Court erred in instructing and charging the Jury upon request of the appellee as follows:

INSTRUCTION NO. 1.

> The plaintiff in his complaint alleges that he is permanently and totally disabled because of epilepsy and has been so disabled since July 1, 1918. If you find that the plaintiff suffered from epilepsy between the dates of his entry into the service of the United States (February 5, 1918) and prior to the issuance to him of insurance by the Government March 11, 1918, your verdict must be for the Government as to said contract of Five Thousand Dollars for if the plaintiff was suffering from the same affliction prior as after the issuance of said insurance contract, he suffered no loss subsequent to the date of said contract.

II.

That the Court erred in instructing and charging the jury upon request of the appellee as follows:

INSTRUCTION NO. 2.

The plaintiff in his complaint alleges that he is permanently and totally disabled because of epilepsy and has been so disabled since July 1, 1918. If you find that the plaintiff suffered from epilepsy between the dates of his entry into the service of the United States (February 5, 1918) and prior to the date of the issuance of insurance to him by the Government June 1, 1918, your verdict must be for the Government as to said contract of Five Thousand Dollars for if the plaintiff was suffering from the same affliction prior as after the issuance of said insurance contract, he suffered no loss subsequent to the date of said contract.

III.

That the court erred in refusing to charge the jury as requested by the appellant as follows:

INSTRUCTION NO. 1

As you understand, gentlemen, this is an action upon a policy of War Risk Insurance in the amount of $10,000 issued by the United States Government to the plaintiff while in the military service of the United States. The policy provides that in the event the insured becomes totally and permanently disabled the United States will pay to him the sum of $57.50 per month commencing at the date of such disability. Until the insured becomes totally and permanently disabled it is neces-

sary to keep the policy in force, to pay the premiums thereon. In the event the insured does become totally and permanently disabled while the policy is in force, then such disability matures the policy and no further premiums are required. If said policy has been issued and in force for a period of six months the validity of said policy may not be contested except for the non-payment of premiums or for some other reason with which you are not here concerned. No action has been taken by the Government to contest the validity of the policy in this case and if you find that the plaintiff was on or about the 14th day of September, 1918, or at any time prior to November 1, 1918, totally and permanently disabled, then such policy has been in force ever since the date of its issuance. The sole issue in this case therefore is, did the plaintiff become totally and permanently disabled on or about the 14th day of September, 1918? If you find by a preponderance of the evidence that he did become so disabled, then your verdict must be for the plaintiff. If on the other hand, you are not convinced by a preponderance of the evidence that he became so disabled, then your verdict must be for the defendant.

IV.

The court erred in refusing to charge the jury as requested by the appellant as follows:

INSTRUCTION NO. 2

You are instructed that where two persons enter into a contract or agreement assuming a

certain fact or condition to exist, in the absence of fraud or mistake, neither party to such contract may thereafter deny the existence of such fact or condition. For instance, in this case, the plaintiff and the United States of America entered into a contract whereby the plaintiff became insured against total and permanent disability. The parties assumed and agreed at the time of the issuance of the policy or policies that the plaintiff was not totally and permanently disabled. In the absence of any fraud or mistake, the United States of America is now estopped from asserting that the plaintiff was then totally and permanently disabled. In order to raise these questions, that is of fraud or mistake, it is necessary that some allegation thereof be made in proper form so that an issue of fact may be joined thereon. This the Government has not done. I therefore instruct you that the policy or policies of insurance applied for by the plaintiff and issued to him by the Government were valid and binding contracts of insurance.

V.

That the Court erred in denying appellant's motion for a judgment upon the special verdict and ordering judgment for the appellee.

ARGUMENT

It was the contention of appellee during the trial, and will no doubt be urged before this court, that appel-

lant was totally and permanently disabled at the time the policies were issued and hence has suffered no loss thereunder. The issue thus raised is the physical condition or the insurable condition of appellant at the time the policies were issued.

The position of appellant is as follows:

The physical condition of the appellant at the time the insurance was granted cannot be made the basis of a defense to the action

(a) Under Section 200 of the World War Veterans' Act of 1924 as amended July 2, 1926 43 Stat. 616, appellant at the time of his enlistment in the service was conclusively held to have been in sound condition. Under the act of September 2, 1914, appellant was entitled to have issued to him without further physical examination insurance in the amount of $10,000.00.

(b) The policies were in force for more than a period of six months and are incontestable upon any ground relied upon by appellee.

(c) Appellee is estopped from asserting that appellant was totally and permanently disabled at the time the policies were issued for the reason that it was then assumed and agreed that appellant was not totally and permanently disabled, the parties each having recognized the validity of the contract and appellee accepting the payment of premiums thereon.

In order to present these matters clearly, we will set forth the applicable provisions of the statutes involved:

Section 200 of the World War Veterans' Act of 1924 as amended July 2, 1926, is in part as follows:

> "That for the purposes of this act, every such officer, enlisted man * * who was employed in active service * * on or before November 11, 1918 * * shall be conclusively held and taken to have been in sound physical condition when examined, accepted and enrolled for service, except as to defects, disorders or infirmities made of record in any manner by proper authorities of the United States at the time of, or prior to, inception in active service, to the extent to which any such defect, disorder or infirmity was made of record."

The Act of September 2, 1914, c. 293, par. 401, as added by Acts Oct. 6, 1917 c. 105, 40 Stat. 409, is in part as follows:

> "In order to give every commissioned officer and enlisted man * * when employed in active service * * protection for themselves and their dependents, the United States, upon application to the Bureau, and without medical examination, shall grant insurance against the death or total permanent disability of any such person * *"

Section 307 of the World War Veterans' Act of 1924, 43 Stat. 627:

> "Policies of insurance heretofore or hereafter issued shall be incontestable after the insurance has been in force six months from the date of issuance or reinstatement, except for fraud or non payment of premiums and subject to the provisions

of Section 23; provided that a letter mailed by the bureau to the insured at his last known address informing him of the invalidity of his insurance shall be deemed a contest within the meaning of this section. Provided further, that this section shall be deemed to be in effect as of April 6, 1917."

Section 23 merely provides that the discharge or dismissal from the service because of treason or any offense involving moral turpitude, etc., shall bar all rights to compensation, insurance, etc.

(a) APPELLANT'S PHYSICAL CONDITION AT TIME INSURANCE GRANTED IMMATERIAL. Appellant was examined, accepted and enrolled in the service of the United States on the 5th day of February, 1918. No defects, disorders or disabilities were noted and made of record by any officer of the United States at that time or prior thereto. Appellant was then conclusively held to have been in sound physical and mental condition and under the provisions of the statute he was then entitled to have issued to him the insurance in question—without medical examination. His physical condition at the time of the application for insurance must necessarily be immaterial, otherwise a medical examination could be required. The officer to whom the application was made could not, under the statute, question his insurability or do aught but issue the insurance. The physical condition of appellant being at that time immaterial, how can such issue become material on an action on the policy? Yet the court submitted that issue to the jury and allowed the jury to find a fact immaterial when the

contract was made, and then made such immaterial fact the basis of judgment.

(b) POLICIES INCONTESTABLE AFTER SIX MONTHS. It seems to be the universal rule that a policy of insurance containing a provision that it shall be incontestable after a specified length of time, with certain exceptions, cannot be contested upon any ground not excepted.

> "The modern rule is that a life insurance policy containing a provision that it shall be incontestable after a specified time cannot be contested by the insurer on any ground not excepted in that provision. Williams v. Insurance Co., 189 Mo. 70, 87 S. W. 499; Massachusetts Benefit Life Assn. v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; Insurance Co. v. Montgomery, 116 Ga. 799 43 S. E. 79; Wright v. Insurance Co., 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; Patterson v. Insurance Co. 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899; Mutual Reserve Assn. v. Austin, 142 Fed. 398, 73 C. C. A. 498, 6 L. R. A. (N. S.) 1064; Murray v. Insurance Co. 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742; Clement v. Insurance Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; Insurance Co. v. McClure 138 Ky. 138, 127 S. W. 749, 27 L. R. A. (N. S.) 1026; 25 Cyc. 873." Harris v. Security Life Ins. Co., 154 S. W. 68.

The assertion that there was no loss under the policy, to which defense the incontestability clause does not apply, is a sham and fictitious contention. Stripped

of its sophistry, it is in truth and fact only a denial of the plaintiff's insurable condition at the time of his application; it is but an assertion that the policy was never in force because of the physical condition of the plaintiff. This the defendant is precluded and estopped from asserting.

In the case of Mutual Reserve Fund Assn. v. Austin, 73 C. C. A. 498, 142 Fed. 398, it was contended that the insurable condition of plaintiff at the time of the application was not covered by the incontestable clause, that the good health of insured was a condition precedent to the validity of the policy, that a condition precedent should be distinguished from a breach of warranty. The court said:

> "They must both stand upon the same ground. We must adopt a construction based upon a consistent application of the same rule."

In the opinion the court characterizes the contention that the incontestable clause does not apply to a condition precedent as fictitious.

> "An agreement that a policy shall be incontestable is of no significance unless we assume the existence of grounds for a contest in the terms of the contract, or in extrinsic facts. * * A construction which renders the clause self-destructive and of no avail to the assured is to be avoided. * * To adopt a construction which includes in the agreement to relinquish defenses all the warranties and conditions of the first undertaking is to destroy the second agreement to relinquish defenses. To avoid

the reductio ad absurdum which follows, if we interpret the words 'in force' to mean a full obligation, counsel contend that the incontestable clause is not a mere pretense, but that it has real significance."

In the case of American National Insurance Company v. Briggs, 156 S. W. 909, the court said:

"Counsel for appellant, however, further contends that the provision that the policy shall be incontestable for any cause whatever, if it continue in force one year from its date, does not include exemption for liability under the provision in the application that the policy shall not take effect 'until the first premium has been paid during my insurability,' the claim being that the incontestable clause does not mean that appellant shall be liable in case appellee possessed no 'insurability' at the time the policy was issued. If, as contended by counsel, the meaning to be attached to said clause is that Mrs. Briggs should have been in the condition of health her application in fact represented her to be, otherwise there would be no liability, we are nevertheless of the opinion that it also must fall before the incontestable clause, after the expiration of the year."

And in Commercial Life Ins. Co. v. McGinnis, 97 N. E. 1018, it was held:

"The incontestable clause amounted to something more than a mere matter of form. As said in the case of Clement v. New York Life Ins. Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70

Am. St. Rep. 650: 'The practical and intended effect of the stipulation is to create a short statute of limitation in favor of the insured, within which limited period the insurer must, if ever, test the validity of the policy. It has been held that an agreement limiting the time within which an action may be brought upon a policy of insurance by the beneficiary is not against public policy, and may be enforced, though less than the usual time imposed by law has been fixed. If this be so, it is difficult to see why a similar limitation upon the right of the insurer to contest should be against public policy, and why it should not be enforced by the courts.' By the clause in question appellant took one year for the purpose of investigating and determining whether it would exercise its right to repudiate and rescind its contract on the ground it is now interposing as a defense. If it had exercised any diligence, and the insured's physical condition was that now claimed by appellant, it might easily have discovered such condition within the time reserved by it for that purpose. If it failed to exercise vigilance in this respect, it must be treated as having waived its right to deny liability on such ground. Kline v. National Benefit Assn. 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703; Court of Honor v. Hutchens, 43 Ind. App. 321, 82 N. E. 89; Reagan v. Union Mutual Life Ins. Co. 189 Mass. 555, 76 N. E. 217, 2 L. R. A. (N. S.) 821, 109 Am. St. Rep. 659, 4 Ann. Cas. 362; Clement v. New York Life Ins. Co., supra."

The case of Mohr v. Prudential Insurance Company of America, 78 Atl. 554, held as to the necessity of being in good health at the time of delivery of the policy:

> "The defendant does not dispute that a period of more than one year had elapsed between the date of the policies and the death of the insured. The defendant contends, however, that the policies must have had a legal inception in order to sustain an action thereon, and that before the plaintiff could claim the benefit of the incontestable clause she must show that all the conditions precedent to the issuance of the policies have been complied with. To this contention it should be said that the policies were issued and were delivered; that the premiums due upon said policies were received by the defendant up to the time of the death of the insured; that the policies were treated by the insured and the defendant as subsisting contracts between them. The policies upon their face purport an obligation on the part of the defendant. To an action to enforce this apparent obligation the defendant interposes the defense that the insured was not in good health at the time of the delivery of the policies. Upon this ground the *defendant is contesting its liability under the policy*. Such a contest is within the scope of that clause which makes the policy incontestable after one year from its date if all due premiums shall have been paid, without by its terms excluding any ground of defense. To hold otherwise would be to permit such a clause in its unqualified form to

remain in a policy as a deceptive inducement to the insured."

The case of Wamboldt v. Reserve Loan Life Insurance Company, 131 S. E. 395, is squarely in point. The following allegation of the answer in this case was borne out by the evidence.

> "That on said date (date of issuance) plaintiff was blind, having theretofore, to-wit, on June 9, 1921, suffered the entire and irrecoverable loss of the sight of both eyes; that he was permanently disabled at the time the contract was made and that by reason of this fact the said supplemental contract was and is null and void * * *."

It was then contended:

> "Since blindness antedated the making of the disability contract there could have been no valid contract as against that hazard under the rule that continued existence of the subject matter is necessary to sustain the contract."

The court there passed upon the identical question here involved and held that such a defense was precluded, not being excepted by the incontestable clause.

The only exceptions contained in the incontestable clause applicable to this policy are fraud or non payment of premiums. Neither of these defenses can be successfully urged.

PREMIUMS PAID. The first policy in the amount of $5,000.00 was issued March 11, 1918, and premiums were paid up to and including the month of

September, 1918 (Tr. 12). This policy would not have lapsed until midnight, October 31, 1918.

McPhee v. U. S., 31 Fed. (2d) 243. Before that date the policy matured by reason of appellant's total and permanent disability. The second policy of $5,000 was issued June 1, 1918 and premiums paid to keep it in force until October 31, 1918, before which date this policy was matured for the same reason. Therefore, there can be no question raised as to the non payment of premiums.

FRAUD IS NOT CHARGED. No plea of fraud was made by appellee, nor was it asserted during the trial.

> "Fraud is never presumed, but must be affirmatively proved." Northwestern National Insurance Company of Milwaukee v. Chambers, 24 Ariz. 86.
>
> "Fraud must be specially pleaded in an answer as well as a complaint." Tucker v. Parks, 7 Colo. 70, 298, 1 Pac. 427, 3 Pac. 486.
>
> DeVotie v. McGerr, 15 Colo. 467, 24 Pac. 923, 22 Am. St. Rep. 426.
>
> Holcomb v. Noble, 69 Mich. 396, 37 N. W. 497.
>
> Albuquerque National Bank v. Stewart, 3 Ariz. 293.

The defense urged is that the appellant was not in an insurable condition at the time the policies were issued. This is covered by the incontestable clause. The court erred in refusing to give the instructions requested by the appellant and in submitting to the jury

the question of the appellant's physical condition at the time of the issuance of the policies.

(c) APPELLEE IS ESTOPPED TO ASSERT INVALIDITY OF POLICY. If it be contended that the condition of appellant's health at the time the policies were issued is material, then the Government is estopped to now assert that the appellant was then totally and permanently disabled, and that by reason thereof the contract is invalid. It was assumed by the appellent and by the officers of the Government that he was insurable. Both parties treated the contract as in force. Premiums were paid thereon by the appellant and accepted by the United States. In the case of Stevens v. U. S. (8th Circuit) 29 Fed. (2d) 904, upon a similar state of facts, the court adopted this rule:

> "If in making a contract the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands, in the absence of fraud, accident or mistake."

In this case the court held the insured estopped to assert a prior total permanent disability when it was assumed and agreed at the time of making the contract, both by himself and the officers of the United States, that he was not totally and permanently disabled.

It would have been a very simple matter for the United States, under the provisions of Section 307 supra, to contest the validity of the policy in this case had they deemed the contract invalid. Under the statute, a letter addressed to insured at his last known

address is sufficient. Appellant was discharged from the service as being unfit for such duty because of epilepsy. There is nothing in the record to show that the Government at any time asserted that there was fraud, mistake or any other fact that would invalidate this policy. Where the statute requires such assertion to be made within six months, it certainly cannot be made after ten years.

THE COURT SHOULD HAVE GRANTED APPELLANT'S MOTION FOR JUDGMENT. The jury by the special verdict found that appellant was totally and permanently disabled at a date prior to the time when his policies would otherwise have lapsed. It necessarily follows that he has been totally and permanently disabled at all times since and, if the policy is incontestable, entitled to recover. Upon the special verdict, the appellant moved for judgment. This was denied by the court. It is conceded that appellant was regularly enlisted in the service and that insurance against total and permanent disability in the amount of $10,000 was issued to him. By the finding of the jury, his total and permanent disability matured the policy. Every fact essential to support a judgment in his behalf was thus conceded or found by the jury. The special verdict found is controlling over the general verdict returned.

McPhee v. U. S., 31 Fed. (2d) 243.

It would serve no useful purpose to retry the case, as there is no dispute in the essential facts. A judgment for the appellant should be ordered upon the special verdict.

CONCLUSION

In conclusion we respectfully submit:

1. That the court erred in submitting to the jury the issue of appellant's physical condition at the time the insurance was granted for the reason that such fact was immaterial. The instructions requested by appellant withdrawing this issue from the jury should have been given.

2. That the appellee is precluded from asserting that the appellant was totally and permanently disabled at the time the insurance was granted because of the incontestable provision of the policy.

3. That the appellee is now estopped to assert the invalidity of the policy, having treated the contract in force and accepted benefits thereunder.

4. The essential facts not being in dispute, the court should have ordered judgment for the appellant upon the special verdict of the jury.

Respectfully submitted,

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